

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2006
5 (Argued: February 12, 2007 Decided: September 24, 2007)
6 Docket Nos. 06-4600-cv(L); 06-4861-cv(XAP)
7 -----x

8 FORD MOTOR CREDIT CO.,
9

10 Plaintiff-Appellee-Cross-Appellant,
11

12 -- v. --
13

14 NYC POLICE DEPARTMENT, PROPERTY CLERK, CITY OF NEW
15 YORK,
16

17 Defendants-Appellants-Cross-Appellees.
18

19 -----x
20
21 B e f o r e : WALKER and HALL, Circuit Judges, and COTE,
22 District Judge.*

23 Appeal by the City of New York from a judgment of the United
24 States District Court for the Southern District of New York
25 (Sidney H. Stein, Judge) requiring, when Ford Motor Credit
26 Company possesses a valid security interest in a vehicle subject
27 to forfeiture pursuant to Title 38, Section 12-36 of the Rules of
28 the City of New York, that the City (1) permit Ford Motor Credit
29 to participate as a party in the forfeiture action and (2)
30 commence the forfeiture action within twenty-five days from the

1 * The Honorable Denise Cote, of the United States District
2 Court for the Southern District of New York, sitting by
3 designation.

1 date that Ford Motor Credit makes a demand on the vehicle,
2 provided that a "claimant" would otherwise be entitled to make a
3 demand on the vehicle.

4 Cross-appeal by Ford Motor Credit from the district court's
5 judgment (1) permitting the City to deduct ten percent of the
6 gross proceeds of the sale of a vehicle deemed forfeited and (2)
7 permitting the City to require Ford Motor Credit to execute a
8 release and indemnification agreement in the City's favor before
9 the City releases the remaining ninety percent of the proceeds,
10 the latter issue having been resolved by agreement of the parties
11 reached after oral argument.

12 AFFIRMED.

13 JANET L. ZALEON, Assistant
14 Corporation Counsel (Michael
15 A. Cardozo, Corporation
16 Counsel of the City of New
17 York, Kristen M. Helmers,
18 Sheryl R. Neufeld, of counsel,
19 on the brief), New York, NY,
20 for Defendants-Appellants-
21 Cross-Appellees.

22
23 DAVID L. TILLEM and KATHLEEN
24 DALY, Wilson, Elser,
25 Moskowitz, Edelman & Dicker
26 LLP, White Plains, NY, for
27 Plaintiff-Appellee-Cross-
28 Appellant.

29 JOHN M. WALKER, JR., Circuit Judge:

30 The state has long had the power to forfeit property used

1 for criminal purposes, but the power's pedigree does not excuse
2 the City of New York's continued use of antiquated rules to
3 govern its exercise. Where the federal government once sought to
4 seize tax-delinquent distilleries without a hearing because its
5 need for funds was urgent, Springer v. United States, 102 U.S.
6 586, 593-94 (1881), the City now seeks to preclude Ford Motor
7 Credit Company ("Ford Motor Credit") from participating in
8 forfeiture proceedings because the City is in no hurry. This it
9 may not do. We therefore affirm the district court's considered
10 judgment in all respects.

11 **BACKGROUND**

12 Defendant-Appellant City of New York¹ has authorized its
13 police department to seize any motor vehicle that is "suspected
14 of having been used as a means of committing crime or employed in
15 aid or furtherance of crime," N.Y. City Admin. Code § 14-140(b),
16 as the first step toward obtaining title to the vehicle through
17 civil forfeiture, Krimstock v. Kelly (Krimstock I), 306 F.3d 40,
18 44 (2d Cir. 2002). Shortly after the City seizes a vehicle, and
19 after affording notice of the seizure to various interested
20 parties, including in many cases the holder of a security
21 interest in the vehicle, the vehicle's owner or driver is "given
22 an opportunity to test the probable validity of the City's

1 ¹ We use the term "the City" as shorthand for the various
2 defendants to this action, including the New York City Police
3 Department and the Property Clerk of the City of New York.

1 deprivation of [the] vehicle[]" pending adjudication of the
2 City's forfeiture case. Krimstock I, 306 F.3d at 70. If the
3 City also wishes to retain the vehicle as "arrest evidence" or
4 "trial evidence" pending conclusion of a criminal proceeding,
5 see 38 R.C.N.Y. § 12-31; Krimstock v. Kelly (Krimstock III),² 464
6 F.3d 246 (2d Cir. 2006), it may do so, see Krimstock III, 464
7 F.3d at 255; N.Y. City Admin. Code § 14-140(g); 38 R.C.N.Y. § 12-
8 36(a).

9 After what is now termed a "Krimstock" hearing, if the City
10 can justify the continued retention of a seized vehicle, either
11 because it is likely to prevail in the eventual forfeiture action
12 or because it wishes to retain the vehicle as evidence against
13 the owner or driver, it generally does not press further for
14 forfeiture until the district attorney's office notifies the City
15 that a criminal case against the vehicle's owner or driver will
16 not be brought or has been concluded.³ 38 R.C.N.Y. § 12-35(d)
17 (providing a method for obtaining a district attorney's release);
18 cf. County of Nassau v. Canavan, 802 N.E.2d 616, 623 (N.Y. 2003)
19 (discussing a similar Nassau County ordinance and noting that
20 "the [forfeiture] action may not be finally resolved for many

1 ² Although captioned differently, Jones v. Kelly, 378 F.3d 198
2 (2d Cir. 2004), is the second episode in the Krimstock saga.

1 ³ Under 38 R.C.N.Y. § 12-34(a), a person may also request that
2 the district attorney release his vehicle to the Property Clerk
3 prior to the conclusion of the related criminal case.

1 months or years, particularly because upon motion of . . . the
2 County, the action must be stayed during the pendency of the
3 underlying criminal case"). At that point, a "claimant" may
4 demand a seized vehicle's return. See 38 R.C.N.Y. § 12-31. The
5 "term 'claimant' shall mean [only] the person from whose person
6 or possession [the vehicle] . . . was taken or obtained." Id.
7 If no "claimant" demands the vehicle's return within 120 days of
8 the conclusion of the criminal case, "[t]he [vehicle] may be
9 disposed of by the police property clerk" at his leisure. Id. §
10 12-32(e)(ii); cf. id. § 12-35(c) (providing that a demand is only
11 "timely if made within 120 days after the termination of criminal
12 proceedings").

13 If, on the other hand, a claimant demands the vehicle's
14 return, the City must institute a forfeiture action within
15 twenty-five days. Id. § 12-36(a).⁴ While only the vehicle's
16 owner and/or driver is a claimant, see id. § 12-31, any party,
17 including a lienholder, is "not [a] lawful claimant" if
18 associated with criminal conduct involving use of the vehicle and
19 thereby precluded from recovering the vehicle, see N.Y. City
20 Admin. Code § 14-140(e) (one who "suffered [his vehicle] to be
21 used" in committing a crime is not a lawful claimant); id. (one

1 ⁴ As we explained in Krimstock I, "the statute here requires
2 only that a forfeiture proceeding be initiated within 25 days
3 after a claim is made." 306 F.3d at 54 n.14. Ford Motor Credit
4 complains principally that the City is dilatory in prosecuting
5 forfeiture cases once begun.

1 who "derives his or her claim in any manner" from someone who is
2 not a lawful claimant is also not a lawful claimant); Krimstock
3 I, 306 F.3d at 56 & nn.16-17. The City must afford all claimants
4 and "any other interested persons" notice of and an opportunity
5 to be heard in the forfeiture proceeding. See 38 R.C.N.Y. § 12-
6 36(b). However, only a "lawful claimant" is entitled to the
7 return of a vehicle seized by the police.⁵

8 If the City can show by a preponderance of the evidence that
9 it is entitled to forfeit the vehicle, see id. -- because it is
10 connected with criminal activity, thus precluding the existence
11 of a "lawful claimant" to the vehicle -- it may sell the vehicle
12 at auction. If a third party has a security interest in the
13 vehicle, the City will remit ninety percent of the auction
14 proceeds to that party. Ford Motor Credit Co. v. N.Y. City
15 Police Dep't, 394 F. Supp. 2d 600, 604 (S.D.N.Y. 2005). However,
16 in order to obtain these funds, that person must submit an
17 "Auction Proceeds Claim Form" and execute a "General Release with

1 ⁵ This byzantine statutory scheme is a relic of the days when
2 a "lawful claimant" had to bring a civil action in replevin in
3 order to obtain the return of seized property. Krimstock I, 306
4 F.3d at 56 n.16. We reiterate what we have said in the past: We
5 see little reason to preserve such a complicated and outdated
6 scheme. See, e.g., Jones v. Kelly, 378 F.3d at 200; Krimstock I,
7 306 F.3d at 56 n.16 (criticizing "cumbersome construction");
8 Butler v. Castro, 896 F.2d 698, 703 (2d Cir. 1990) (criticizing
9 failure "to eliminate the obsolete provisions of the Code");
10 McClendon v. Rosetti, 460 F.2d 111 (2d Cir. 1972).
11

1 Indemnification Agreement.”⁶ Id.

2 The forfeiture process -- from seizure to auction -- takes
3 considerable time. See id. at 613 (“In [some] instances, the
4 Property Clerk held vehicles for extended periods of time without
5 instituting forfeiture proceedings or selling vehicles as
6 abandoned”); see also Prop. Clerk v. Duck Jae Lee, 702
7 N.Y.S.2d 792, 795 (Sup. Ct. 2000). During that time, the value
8 of a seized vehicle often decreases considerably. Cf. Krimstock
9 I, 306 F.3d at 64 (“[L]oss is felt . . . [as] a vehicle . . .
10 continues to depreciate in value as it stands idle in the police
11 lot.”).

12 Plaintiff-Appellee Ford Motor Credit levies a barrage of
13 challenges to the rules governing forfeiture proceedings. Ford
14 Motor Credit principally complains (1) that the City has refused
15 to consider secured creditors as “claimants” (or their analogue)
16 -- although they are in many cases “not lawful claimants” -- thus
17 precluding them from triggering the City’s duty to initiate a
18 forfeiture action within twenty-five days and (2) that the City
19 has refused to consider secured creditors as “interested persons”
20 entitled to notice of and an opportunity to be heard in

1 ⁶ The “General Release with Indemnification Agreement” used at
2 the time the City took this appeal reads in pertinent part:
3 “[T]he releasors will hold harmless the releasee, the New York
4 City Police Department . . . and indemnify same from any claim or
5 claims that may be asserted against them and for any damage,
6 expense or cost which the New York City Police Department may
7 suffer in connection with [the] property.”

1 forfeiture proceedings. Citing Mathews v. Eldridge, 424 U.S. 319
2 (1976), Ford Motor Credit argues that by refusing to permit it to
3 expedite and participate in the forfeiture process, the City has
4 deprived it of property without due process in violation of the
5 Fourteenth Amendment. The District Court for the Southern
6 District of New York (Sidney H. Stein, Judge) entered summary
7 judgment in Ford Motor Credit's favor on these claims.⁷ It held
8 that "(i) Ford Credit is entitled to notice and an opportunity to
9 be heard in any forfeiture action commenced by the City
10 concerning a vehicle in which Ford Credit holds a valid security
11 interest; [and] (ii) the City must commence a forfeiture action
12 within a reasonable time upon a demand for a seized vehicle from
13 Ford Credit when Ford Credit holds a valid security interest in

1 ⁷ Ford Motor Credit also contends that the City's requirement
2 that secured creditors sign the "General Release with
3 Indemnification Agreement" "shocks the conscience" and violates
4 the Fourteenth Amendment. We need not consider this argument, as
5 the parties have agreed to amend the "General Release with
6 Indemnification Agreement." Finally, Ford Motor Credit argues
7 that the City's retention of ten percent of the auction proceeds
8 constitutes an excessive fine in violation of the Eighth
9 Amendment (or, in the alternative, also "shocks the conscience"
10 in violation of the Fourteenth Amendment). While there is cause
11 for some concern over the poor correlation between the
12 administrative costs the City likely incurs and the flat, ten-
13 percent fee it charges secured creditors, we agree with the
14 district court that the imposition of this fee does not violate
15 the Eighth Amendment and that "[t]he City's actions do not rise
16 to the 'conscience-shocking level' that would be necessary to
17 support a claim of denial of substantive due process." See Ford
18 Motor Credit, 394 F. Supp. 2d at 617 (internal quotation marks
19 omitted).
20

1 that vehicle.” Ford Motor Credit, 394 F. Supp. 2d at 620. The
2 City appealed, and we now affirm.

3 ANALYSIS

4 I. Application of the Due Process Clause

5 In adjudicating due process claims, “we consider two
6 distinct issues: 1) whether plaintiffs possess a liberty or
7 property interest protected by the Due Process Clause; and, if
8 so, 2) whether existing state procedures are constitutionally
9 adequate.” Kapps v. Wing, 404 F.3d 105, 112 (2d Cir. 2005). The
10 City relies on several state-court cases to argue that Ford Motor
11 Credit lacks a property interest in a seized vehicle distinct
12 from its interest in ninety percent of the proceeds from its
13 eventual, post-forfeiture sale (supplemented, to be sure, by any
14 deficiency judgment Ford Motor Credit may obtain against the
15 vehicle’s owner). See, e.g., Prop. Clerk v. Molomo, 613 N.E.2d
16 567, 567 (N.Y. 1993) (“Ford ha[s] no present possessory right in
17 the vehicle, and its remedy . . . is to receive the proceeds from
18 the City’s forfeiture sale and to seek any deficiency against the
19 debtor.”); Prop. Clerk v. Foley, 724 N.Y.S.2d 580 (App. Div.
20 2001) (same); Prop. Clerk v. Aquino, 800 N.Y.S.2d 355 (Sup. Ct.
21 2004).⁸ We disagree that Ford Motor Credit’s only cognizable

1 ⁸ “[I]n the event of nonforfeiture,” the City argues that Ford
2 Motor Credit may “sue [vehicles’ owners] for return of the
3 vehicles or for such other relief as might be provided in their
4 contracts with [those owners].” Foley, 724 N.Y.S.2d at 580-81.

1 property interest is in a vehicle's sale proceeds. For the three
2 reasons that follow, we conclude that Ford Motor Credit also has
3 a property interest in the present value of a seized vehicle.

4 First, a security interest is indisputably a property
5 interest protected by the Fourteenth Amendment. See, e.g.,
6 Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983);
7 United States v. 41741 Nat'l Trails Way, 989 F.2d 1089, 1092 (9th
8 Cir. 1993); United States v. 1 St. A-1, 865 F.2d 427, 430 (1st
9 Cir. 1989). A secured creditor has two rights: the contractual
10 right to repayment of the debt owed and the property right to the
11 collateral that secures the debt in the event of non-payment.
12 See Armstrong v. United States, 364 U.S. 40, 46 (1960). Thus,
13 while Ford Motor Credit may (conceivably) protect its contractual
14 right to repayment by seeking ninety percent of the proceeds from
15 a vehicle's sale, the City's delays impair Ford Motor Credit's
16 property right, which is in the collateral itself -- the seized
17 vehicle. Cf. Armstrong, 364 U.S. at 46 (holding that a valid
18 Takings Clause claim lay where plaintiffs' liens remained in
19 effect but were unenforceable against the collateral following
20 forfeiture); see also Matagorda County v. Law, 19 F.3d 215, 225
21 (5th Cir. 1994) ("Unmitigated delay, coupled with diminishment of
22 distinct investment-backed expectations, may, at some point,
23 infringe on the entire 'bundle' of rights" (emphasis
24 omitted)). Just as in Winston v. City of New York, where we held

1 that teachers had a state-created property interest in the
2 present value of their pensions, so too, Ford Motor Credit has a
3 property interest in the present value of a seized vehicle.
4 Cf. 759 F.2d 242, 247-48 (2d Cir. 1985).

5 Moreover, at common law, when the government forfeits
6 property, "the vesting of its title in the property relates back
7 to the moment when the property became forfeitable." United
8 States v. 92 Buena Vista Ave., 507 U.S. 111, 126 (1993). Under
9 the Takings Clause of the Fifth Amendment, the fair market value
10 of property taken is normally ascertained as of the date of the
11 taking. Yancey v. United States, 915 F.2d 1534, 1543 (Fed. Cir.
12 1990). Thus, were this a Takings Clause case, Ford Motor Credit
13 might well be entitled to the value of its security interest as
14 of the time the City seized the vehicle. It is hard to square
15 this authority with the City's argument that Ford Motor Credit's
16 property interest for due process purposes is limited to the
17 value of the vehicle at the later time of forfeiture.

18 Cf. Sheldon v. United States, 7 F.3d 1022, 1031 (Fed. Cir. 1993)
19 (holding that the government must compensate mortgage holders for
20 the depreciation in their security interest between the date the
21 collateral became forfeitable and the date the government
22 obtained a final judgment of forfeiture).

23 Our conclusion accords with the Fourth Circuit's decision in
24 In re Metmor Financial, Inc., 819 F.2d 446 (4th Cir. 1987). In

1 that case, the court construed the Comprehensive Drug Abuse
2 Prevention and Control Act, 21 U.S.C. § 881 (1978), which
3 provides for forfeiture of certain drug-related property, to
4 require the government to pay interest on an interest-bearing
5 lien during the pendency of a forfeiture proceeding. The Fourth
6 Circuit explained,

7 [E]ven though forfeiture occurred prior to the actual
8 seizure, the government can succeed to no greater interest
9 in the property than that which belonged to the wrongdoer
10 whose actions have justified the seizure. Ackley purchased
11 the property encumbered by Metmor's secured note, with
12 interest accruing. His equity was subject to an obligation
13 to repay the borrowed principal and to pay interest on the
14 unpaid balance until all of the principal was repaid. The
15 government now attempts to transform that note into one that
16 is unsecured and interest free. Such a result would deprive
17 Metmor of its stake in the forfeited property and would
18 constitute a taking without due process.

19
20 Id. at 448-49 (emphasis added).

21 The City argues that even if Ford Motor Credit has a
22 property interest in the present value of a seized vehicle, delay
23 does not "deprive[] [it] of that interest," Sealed v. Sealed, 332
24 F.3d 51, 55 (2d Cir. 2003) (emphasis added); see also N.Y. State
25 Nat'l Org. for Women v. Pataki, 261 F.3d 156, 165 (2d Cir. 2001).
26 Again, we disagree. When the state delays resolution of a claim,
27 the claim holder's Fourteenth Amendment rights may be implicated,
28 at least if the claim holder is not in equal part responsible for
29 the delay. See Canavan, 802 N.E.2d at 624 ("[A] hearing [is]
30 required to ensure that . . . innocent owners are not deprived
31 for months or years of cars ultimately proved not to be subject

1 to forfeiture."); cf. Connecticut v. Doehr, 501 U.S. 1, 11 (1991)
2 (holding that "cloud[ing] title; impair[ing] the ability to sell
3 or otherwise alienate the property; [and] taint[ing] any credit
4 rating" constitute deprivations); British Int'l Ins. Co. v.
5 Seguros La Republica, S.A., 212 F.3d 138, 141 (2d Cir. 2000) (per
6 curiam) ("[E]ven . . . temporary or partial impairments to
7 property rights . . . are sufficient to merit due process
8 protection." (internal quotation marks and citation omitted)).
9 Here, not only is the present value of the claim diminished by
10 the indeterminacy of its eventual realization, but Ford Motor
11 Credit's property interest in the underlying asset suffers, as
12 the vehicle depreciates over time.

13 **II. The Process Ford Motor Credit Is Due**

14 **A. The City must permit Ford Motor Credit to participate in** 15 **forfeiture proceedings.**

16 Pursuant to New York City regulations, the City must
17 "provide the claimant and any other interested persons with an
18 adequate opportunity to be heard" before it may forfeit a seized
19 vehicle. 38 R.C.N.Y. § 12-36(b) (emphasis added). The district
20 court interpreted the term "interested persons" to include
21 secured creditors like Ford Motor Credit. See Ford Motor Credit,
22 394 F. Supp. 2d at 610-11. We agree.

23 Section 12-36 explicitly applies only to the driver of a
24 seized vehicle. Compare 38 R.C.N.Y. § 12-36, with 38 R.C.N.Y. §
25 12-31 (defining a "claimant" as "the person from whose person or

1 possession property . . . was taken"). However, the canon of
2 constitutional avoidance, see Edward J. DeBartolo Corp. v. Fla.
3 Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575
4 (1988); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190
5 N.E.2d 402, 405 (N.Y. 1963), requires that the term "interested
6 persons" be given a broad construction. For instance, an
7 innocent owner must surely be an "interested person." See Prop.
8 Clerk v. Covell, 528 N.Y.S.2d 299, 301 (Sup. Ct. 1988); see also
9 Prop. Clerk v. Pagano, 573 N.Y.S.2d 658, 661 (App. Div. 1991);
10 Krimstock I, 306 F.3d at 57 n.18. Were an innocent owner not an
11 "interested person," 38 R.C.N.Y. § 12-36 might well be
12 unconstitutional.⁹

13 The City argues that while we should construe the term
14 "interested persons" in § 12-36 broadly, it does not include Ford
15 Motor Credit within its ambit; the City contends that Ford Motor
16 Credit cannot be an interested person because it "has [no]
17 information to contribute on the illegal use of [a seized]
18 vehicle." See Appellants' Br. at 34. Even accepting the City's
19 premise -- that only those with something to contribute to the
20 forfeiture proceeding can be "interested persons" -- its argument

1 ⁹ Although the Supreme Court has held that a state need not
2 permit an "innocent owner defense," see Bennis v. Michigan, 516
3 U.S. 442 (1996), in Bennis, like every other forfeiture case
4 considered by the Supreme Court, an innocent owner was at least
5 entitled to "notice [and] an opportunity to contest the
6 [forfeiture]," id. at 446.

1 fails. Were Ford Motor Credit permitted to participate in
2 forfeiture proceedings, it could protect its interest in the
3 present value of a seized vehicle in several ways: it could
4 expedite the litigation by moving the court to dismiss the action
5 for failure to prosecute, see Duck Jae Lee, 702 N.Y.S.2d at 795;
6 cf. United States v. Eight Thousand Eight Hundred & Fifty Dollars
7 (\$8,850) in U.S. Currency, 461 U.S. 555, 569 (1983) (noting that
8 a claimant can "file an equitable action seeking an order
9 compelling the filing of [a] forfeiture action or return of the
10 seized property" (citing Slocum v. Mayberry, 15 U.S. (2 Wheat.)
11 1, 10 (1817))), and also perhaps by seeking an order dismissing
12 the case on account of the vehicle owner's delinquency in meeting
13 deadlines, cf. N.Y. C.P.L.R. 3216; Andrea v. Arnone, Hedin,
14 Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.,
15 840 N.E.2d 565, 569 (N.Y. 2005) ("Litigation cannot be conducted
16 efficiently if deadlines are not taken seriously . . .").¹⁰

17 The City also argues that Ford Motor Credit need not be
18 counted an "interested person" because it could protect its

1 ¹⁰ The City also relies on Foley for the proposition that Ford
2 Motor Credit cannot be an "interested party." 724 N.Y.S.2d 580.
3 Not only does it read too much into Foley, cf. Molomo, 613 N.E.2d
4 at 567 (noting that Ford Motor Credit "received actual notice of
5 the City's seizure of the vehicle and . . . [and has] fully
6 participated in legal proceedings pertaining to the vehicle's
7 disposition"); Ford Motor Credit, 394 F. Supp. 2d at 611 n.5
8 (noting that Foley did not discuss § 12-36), but it ignores that
9 it is federal law that dictates the procedures required by the
10 Fourteenth Amendment, see Krimstock I, 306 F.3d at 60.

1 interest in the present value of a seized vehicle by obtaining
2 title to the vehicle. However, "a party's ability to take steps
3 to safeguard its interests does not relieve the State of its
4 constitutional obligation." Mennonite Bd. of Missions, 462 U.S.
5 at 799.

6 **B. The City must commence forfeiture proceedings within**
7 **twenty-five days from the date Ford Motor Credit makes a**
8 **demand on a vehicle, provided that a claimant would**
9 **otherwise be entitled to make a demand on the vehicle.**

10
11 Unlike § 12-36, 38 R.C.N.Y. § 12-31 is clear on its face:
12 Ford Motor Credit is not a "claimant" and may not demand a
13 vehicle's return. We must therefore consider whether the
14 Fourteenth Amendment requires that Ford Motor Credit be treated
15 as a claimant for purposes of triggering the City's duty to
16 commence a forfeiture action within twenty-five days.¹¹ In
17 answering this question, we have two analytical lenses at our
18 disposal.

19 In \$8,850, the Supreme Court applied the four-factor test
20 propounded first in Barker v. Wingo, 407 U.S. 514 (1972), to a
21 challenge on due process grounds to the length of time between
22 the seizure of property and the initiation of a forfeiture
23 proceeding. See 461 U.S. at 565-70; see also United States v.
24 Banco Cafetero Pan., 797 F.2d 1154, 1163 (2d Cir. 1986) (applying

1 ¹¹ As we have explained, the City may retain a seized vehicle
2 as "arrest evidence" or "trial evidence." Of course, Ford Motor
3 Credit may not seek the premature forfeiture of a vehicle that
4 the City wishes to retain for such purposes.

1 Barker test). Yet in Krimstock I, we held that the Mathews v.
2 Eldridge test applied if property holders wished to challenge the
3 "legitimacy" of the City's retention and forfeiture of their
4 property. See 306 F.3d at 68.

5 It is not clear whether we should apply Barker or Mathews to
6 this case. On the one hand, Ford Motor Credit seeks principally
7 to expedite the forfeiture process, see, e.g., Appellee's Br. at
8 29-31, and the district court appears to have relied on Barker,
9 394 F. Supp. 2d at 614. Moreover, the second Mathews factor --
10 "the fairness and reliability of the existing . . . procedures,
11 and the probable value, if any, of additional procedural
12 safeguards," 424 U.S. at 343 -- is hard to apply, since the
13 gravamen of Ford Motor Credit's complaint is not that the City
14 cannot forfeit seized vehicles, but rather that it must do so
15 more quickly. On the other hand, the fourth Barker factor --
16 "prejudice to the defendant . . . [such that] the claimant [is
17 hampered] in presenting a defense on the merits," \$8,850, 461
18 U.S. at 564, 569 -- is equally hard to apply in this case. And
19 both the City and Ford Motor Credit seem to agree that
20 Mathews should govern. See Appellants' Br. at 39; Appellee's Br.
21 at 16.

22 We need not decide the question, however, since § 12-31 is
23 unconstitutional under either application. As the district court
24 explained, "the City has caused substantial delays," 394 F. Supp.

1 2d at 614, in violation of Barker. Consideration of the Mathews
2 factors -- "(1) the private interest affected; (2) the risk of
3 erroneous deprivation through the procedures used and the value
4 of other safeguards; and (3) the government's interest,"
5 Krimstock I, 306 F.3d at 60 -- yields the same conclusion.

6 First, Ford Motor Credit's interest in the present value of
7 a seized vehicle, while not as great as the interest of the
8 vehicle's owner in possession of a seized vehicle -- because
9 seized vehicles are not used by Ford Motor Credit as "a mode of
10 transportation . . . [or] the means to earn a livelihood," id. at
11 61 -- is still considerable. Indeed, the Supreme Court has
12 affirmed the importance of the income stream derived from
13 ownership of property. See United States v. James Daniel Good
14 Real Prop., 510 U.S. 43, 54 (1993) (noting that "Good was renting
15 his home to tenants," but explaining that even if "the tangible
16 effect of the seizure was limited to taking the \$900 a month he
17 was due in rent[,] . . . it would not render the loss
18 insignificant or unworthy of due process protection"); see also
19 Doehr, 501 U.S. at 12. The second Mathews factor also weighs in
20 Ford Motor Credit's favor, to the extent it can be applied. The
21 owner of a vehicle, if he has in fact used the vehicle in the
22 commission of a crime, has little incentive to demand that the
23 City begin forfeiture proceedings. The risk of delay under the
24 current procedures is thus substantial. Third and finally, the

1 government's interest in refusing to honor a demand that it
2 commence a forfeiture action (after the conclusion of criminal
3 proceedings) is small. Indeed, one would think that the City
4 would wish to prosecute forfeiture cases rapidly, since it
5 obtains at least ten percent of the eventual sale proceeds.
6 Cf. James Daniel Good Real Prop., 510 U.S. at 55-56 (noting a
7 greater risk of erroneous deprivation where the government has a
8 pecuniary interest in retaining property). We thus agree with
9 the district court that "the City has a constitutional obligation
10 to institute forfeiture proceedings within a reasonable time when
11 an interested party, such as a [secured creditor] like Ford
12 [Motor] Credit, seeks a disposition with respect to a vehicle in
13 which it holds a cognizable property interest." 394 F. Supp. 2d
14 at 615.¹² We note only that we read the district court's opinion
15 to afford Ford Motor Credit the same rights in this respect as a
16 claimant, and no more.¹³

17 In sum, we agree with the district court that henceforth,

1 ¹² We observe in passing that we do not require the City to
2 prosecute forfeiture cases inefficiently; it may still hold
3 blocks of seized vehicles and seek their forfeiture at one time.

1 ¹³ Cf. Ford Motor Credit, 394 F. Supp. 2d at 615 ("[T]here is
2 no constitutional requirement that the City recognize Ford Credit
3 as a valid claimant for all purposes pursuant to 38 R.C.N.Y.
4 section 12-35(a). Rather, the City has a constitutional
5 obligation to institute forfeiture proceedings within a
6 reasonable time when an interested party, such as a lienholder
7 like Ford Credit, seeks a disposition with respect to a vehicle
8 in which it holds a cognizable property interest.").

1 when Ford Motor Credit has a security interest in a seized
2 vehicle, the City must (1) permit Ford Motor Credit to
3 participate as a party in the forfeiture action and (2) commence
4 the forfeiture action within twenty-five days from the date that
5 Ford Motor Credit makes a demand on the vehicle, provided that a
6 claimant would otherwise be entitled to make a demand on the
7 vehicle.

8 **CONCLUSION**

9 For the foregoing reasons, the judgment of the district
10 court is AFFIRMED.

11